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JAMES R. B... Clerk

Supreme Court of the United States

No. 578

A. Z. HANDFORD,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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IN THE SUPREME COURT OF THE UNITED STATES

No. .....

A. Z. HANDFORD,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioner, A. Z. Handford, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on November 21, 1958.

OPINION BELOW.

The District Court of the Middle District of Georgia, Thomasville Division rendered no opinion. The opinion of the Court of Appeals for the Fifth Circuit is not yet reported but is appended to the petition in the appendix at page 18.

JURISDICTION.

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on November 21, 1958

(record, page 80) and copy thereof is appended to this petition in the appendix at page 22.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

Petitioner was indicted, tried and convicted for the possession of distilled spirits without payment of tax thereon under 26 U.S.C.A. (b)(1) 5642.

Conviction was had in the District Court on May 20, 1958. The Court entered judgment on May 20, 1958 sentencing petitioner to the custody of the Attorney General for a period of two and one half years. Petitioner having made a motion for judgment of acquittal upon completion of the evidence filed his motion for judgment notwithstanding the verdict and in the alternative for a new trial. Motion was heard and denied on May 28, 1958, by the District Judge. Petitioner contended before the trial court that the evidence was insufficient to support a verdict and that he was deprived of a fair trial by reason of inflammatory and prejudicial argument of the District Attorney.

Petitioner filed an appeal to the United States Court of Appeals for the Fifth Circuit on May 28, 1958 and urged on said appeal that the evidence was insufficient to support a verdict and that he was denied a fair trial by the prejudicial and inflammatory argument of the District Attorney.

The Court of Appeals affirmed, holding the evidence was sufficient to support the verdict and that a portion of the improper argument had been cured by the trial judge and that no timely objection was made to the remaining argument alleged to have been improper. It was contended before the District Judge and the Court of Appeals that the reference to the wealth of petitioner in the argument of the District Attorney was improper and prejudicial.

The questions presented are:

1. Was the evidence sufficient to sustain the verdict?

2. Was the argument of the District Attorney so prejudicial as to deny petitioner a trial before an impartial jury?

3. Was it proper for the District Attorney to comment upon the financial condition of petitioner?

4. Where argument of the District Attorney is so prejudicial as to deny the petitioner a fair trial, was it necessary that objections be made thereto in order that it might be considered by the Court of Appeals?

5. Did the prejudicial argument of the District Attorney deprive petitioner of his constitutional rights under the Fifth Amendment to the Constitution of the United States guaranteeing the citizens due process of law?

6. Did the prejudicial argument of the District Attorney deprive petitioner of his constitutional rights under the Sixth Amendment to the Constitution of the United States, guaranteeing the citizens a trial by an impartial jury?

STATEMENT.

This case was tried before a jury and was the second trial.—petitioner having been previously tried on the same indictment and on appeal to the Court of Appeals for the Fifth Circuit the case was reversed because of improper argument by the District Attorney. *Handford v. U.S.*, 249 Fed. 2d. 295.

On the second trial, counsel for the Government endeavored to strengthen his case in detail but the facts are still the same as on the previous trial. The Government relied on only one witness, L. W. Johnson, the Sheriff of Baker County, Georgia. On the night of July 23, 1956, this witness in company with Messrs. Hancock and Cotton, two State Revenue Agents, went to the home of the defendant where they parked their car with the lights shining on a tractor some fifteen or twenty feet from the defendant's house. The defendant walked toward the car of the officers and stopped on the left hand or driving side and became engaged in a conversation with Officer Hancock who was sitting in the back of the car. Sheriff Johnson says that about the time the defendant walked toward the officers' car, two negroes, one the defendant's wife and the other, Jessie Lee Carlton, ran from the garage in front of the

tractor and squatted down. He asked the defendant who that was that ran in front of the tractor and he replied "that was my chillun". Hancock then began to whisper to Cotton who was driving the car to pull the lights on them. When he pulled the lights on the officers could see the jugs and "the niggers in front of the tractor." He suggested that they ease their doors open and the witness and Cotton jumped out and started running toward the tractor. The defendant's wife and Carlton started bursting the liquor jugs. All were broken but one which was seized. (Record, pages 5 and 6.) The defendant stated that that was not his liquor that it belonged to his wife and Jessie Lee Carlton who were out there pouring it up. (Record, page 10.) The witness testified on the previous trial that the defendant said that he was not there at the pouring. (Record, page 39.) On this trial he told the witness later that he had just driven up. (Record, page 37.)

The officers put handcuffs on defendant's wife and Jessie Lee Carlton but permitted the defendant to go into the house and change his shoes. (Record, pages 39, 40.) A good many people gathered. (Record, page 28.) The officers put the jug of liquor in the car and stayed around talking for some thirty to forty minutes. When they got ready to go, the liquor was gone. (Record, page 41.)

There was considerable detail but this, in the main, was the case made by the Government's evidence. The defendant introduced and had identified by a surveyor

a plat of the premises which appears at page 54 of the Record.

The argument of the District Attorney is reported and appears at pages 55 and 64 of the Record. In the intensity of his zeal for a conviction, he again made an impassioned, and, we think, a prejudicial argument. He began by chiding the defendant with failure to put up evidence. (Record, page 55.) He accused the defendant of being a smart, keen, big operator. (Record, page 56.) A big operator and a smart one, and one that's got money enough to have made a nice plat of the premises, the first the District Attorney in his practice had seen either for or against a defendant in the liquor business. (Record, page 59.)

When this latter reference was objected to, he made re-reference to the efforts of the defendant's counsel in his behalf—although these had proved modest enough —and then said: "This defendant can afford to have refinements in the conduct of the search after the truth. If he is in that kind of money position, er, then he's certainly entitled to do it." (Record, page 60.)

In the final appeal by defendant's counsel to the Court "to stop the District Attorney in a very vicious and prejudicial type of argument", it was discovered that he had about exhausted his time (Record, page 63), and he reluctantly brought his argument to a close.

On this trial of the case, the evidence was substantially the same as the first trial and the appellate court in its opinion refers to its opinion on the first appeal for a statement of the facts On the first appeal, petitioner contended that the facts were insufficient to support the verdict. While not passing on the question specifically the Court brushed it aside saying: "It may well be, as a matter of law, that there is sufficient evidence to support a verdict of guilty." On the second appeal, petitioner specified the insufficiency of the evidence as a ground of appeal, insisted upon it in the brief and the court holds the evidence sufficient without elaboration.

In the first appeal, in discussing the evidence, the Court has said "But it is clear to this Court that the evidence is far from conclusive and that the jury might have found that Handford did not, in fact, have such dominion and control over the whiskey as to constitute possession." Further "the case was close. The evidence was circumstantial. The Government used only one witness. Whatever that witness saw, he saw at night. Under the circumstances—the delicate balance of material facts, the setting, the prestige of the Prosecutor and the Sheriff,—any unfair argument or prejudicial appeal would affect a juror's thinking." *Handford v. United States of America,* 249 Fed. 2d. 295, 298.

Petitioner contended then and contends now that the evidence was insufficient to support a verdict and that the most the evidence would support is a strong sus-

picion or the mere knowledge that a crime was being or had been committed.

McClain v. U. S., 5th Circuit, 1955, 224 Fed. 2d. 522, 525;
Bergedorff v. U. S., 10 Circuit, 1929, 37 Fed. 2d. 248;
Brady v. U. S., 8 Cir., 1930, 39 Fed. 2d. 312;
Toney v. U. S., 1933, 62 App. D.C. 307; 67 Fed. 2d. 573;
United States v. Mazzafalana, 2 Circuit, 1936, 80 Fed. 2d. 826, 827;
Vick v. U. S., 5 Circuit, 1954, 216 Fed. 2d. 228.

The Government produced only one witness who was a State Revenue Agent, and who, during the pendency of the case had been elected Sheriff of Baker County, Georgia. Petitioner is a negro man and the Government's witness accentuated this fact by frequent reference to "negroes" and on three occasions referred to the Negro race as "niggers" (Record, pages 3, 35, and 42). This was not participated in by the District Attorney and no contention is made that the Government encouraged the use of this term by the witness but it nevertheless bolstered evidence already judicially ascertained to be "weak" and made the jurors more susceptible to the improper argument that followed.

The District Attorney in his argument first chastised the defendant's attorneys for failure to produce as witnesses two revenue officers whom he insinuates the defendant's attorneys interrogated. (Record, page 55.) The two witnesses were investigating officers who par-

ticipated in the prosecution and were particularly within the power of the Government to produce and this was highly improper argument.

In *Milton v. United States:* (District of Columbia Circuit) 110 Fed. 2d. 556, 559:

> "The Supreme Court has stated the applicable rule to be that 'if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.' Hence, while it is true that if a witness is equally available to the Government and is in a legal sense a stranger to the accused, no presumption arises against him for his failure to call such a witness, conversely, if the witness is available to the accused and not to the Government, and is informed concerning facts material to the case, the presumption arises from his unexplained absence that the accused had good reason for not calling him; and this may properly be argued against him."

The petitioner in his defense had introduced in evidence a plat of the premises for the purpose of showing that it was easily accessible to the general public. In his argument to the jury, the District Attorney stated as follows:

> "And it's a good thing it's there, because you take a big operator and a smart one, and one that's got money enough—and this, incidentally is the first time that I have ever known of a nice plat of the premises coming into a courthouse where I have

> tried a liquor case, either for or against the man in the liquor business."

The effect of this argument was to state to the jury that the petitioner was a big operator, had lots of money and in all of his practice, the District Attorney had never seen such a fine plat introduced in evidence on either side of a liquor case. In other words, he was insinuating that the Government could not afford such a fine plat but that this rich negro bootlegger could. Upon objection to the argument, the objection was sustained and the District Attorney cautioned. However, immediately after being cautioned he persisted in his argument and made the following statement:

> "Thank you sir, I say to you, Members of the Jury that this case has been defended hard. Every effort has been made to clear this defendant,—as ought to be, that's the duty of the lawyers—this defendant can afford to have refinements in the conduct of the search after the truth. *If he's in that kind of money position* er, then he's certainly entitled to do it."

The District Attorney is a popular, persuasive and highly respected man and his statement to the jury, "This defendant can afford to have refinements in the conduct of the search after the truth," followed by the further statement "if he is in that kind of money position"—is a firm statement to the jury to the effect that the petitioner is a rich man and is highly improper.

It had already been judicially ascertained by the Court of Appeals for the Fifth Circuit, in *Handford v. United*

States, supra, that the case was close and "under the circumstances, the delicate balance of material facts, the setting, the prestige of the prosecutor and sheriff,—any unfair argument or prejudicial appeal would affect a juror's thinking."

With this weak evidence, further flavored by the reference by Sheriff Johnson to the race of the defendant as "nigger", the argument that he was wealthy could have had and did have an improper, prejudicial and fatal effect upon the minds of the jurors.

By its opinion in this case, the Court of Appeals for the Fifth Circuit has either held that reference to the wealth of the defendant is not improper or else that it has to be objected to during the course of the trial. Petitioner contends that it is the rule in all courts of the country—Federal and State—that reference to the wealth of the defendant in a criminal case or indeed in a civil case is highly improper and constitutes reversible error.

We invite attention to the Alabama case of *Grimes v. The State*, 128 So. 120, in which the defendant was being tried for possessing illegal liquor. In the argument, the Solicitor referred to him as a big bootlegger. It was held:

> "The remarks of the State Solicitor in liquor prosecution that defendant was big bootlegger and as law-abiding citizen he would not enter bootlegging business, held prejudicial under evidence."

The case of *Read v. United States,* (9th Circuit) 42 Fed. 2d. 626, was a case in which the United States District Attorney in his argument referred to the wealth of the defendant's family. In reversing the conviction, the Court says in the course of its opinion that latitude must be allowed for the effect upon a prosecutor of the heat engendered during the trial of a case, but argument must be restrained within reasonable limits.

> "It is the duty of the prosecuting attorney to assist in giving a fair trial to a defendant. The Government can not afford to convict its citizens by unfair means. The argument referred to was a subtle and powerful appeal to the prejudice of a jury. Counsel went outside of the evidence to convey to the jury the idea that the Reads had a fortune; . . . Such an argument was clearly prejudicial. The case was a close one on the facts as is evidenced by the various verdicts of the jury on different counts of the indictment. This appeal was undoubtedly a most persuasive influence with the jury to convict the defendant on some count, and was such prejudicial error as to make the trial, in our judgment, an unfair one."

In *Skeggs v. The State,* 135 So. 431 (Ala.) a statement by the prosecuting attorney in his argument that he did not think the deceased "was worth much money as he was working on the police force here and left a wife and two little children" was sufficient ground for the reversal of a conviction of murder in the second degree.

In *Newton v. Com.,* (1922) 195 Ky. 764, 243 S.W. 1031, a prosecution for violation of a state intoxicating liquor

law, the court held that it was reversible error for the prosecuting attorney to say in his argument that the jury had convicted all of the trifling scoundrels and poor devils and that if it did not convict the defendant because he owned a three story brick hotel, the jury and the court would be rightfully criticized and censured.

In *Goof v. Com,* 44 S.W. (2d) 306 (Ky.), in a prosecution for manslaughter, a reference by the prosecuting attorney in his argument to the ability of the defendant to pay "fat fees" to their attorney, along with other improper remarks was held to constitute reversible error.

In a prosecution for adultery, *People v. Montague,* (1888) 71 Mich. 447, 39 N.W. 585, argument of the prosecuting attorney laying great stress on the narrow means of the prosecuting witness and the necessity he felt himself to be in of using peculiar means to obtain proof to overcome the danger that the defendant's wealth, surroundings and influence might enable him to procure false testimony, was held, in view of other improprieties, to require a reversal.

In *State v. Friend,* (1922) 151 Minn. 138, 183 N.W. 241, a prosecution for statutory rape, the court held that it was reversible error for the prosecuting attorney to suggest that the defendant's father was a very wealthy man and that the defendant had a large independent income.

If the decision of the court is construed to hold that the argument was improper but does not constitute reversible error because counsel did not object to it during the course of the trial, it is in conflict with the general rule prevailing in the circuit courts.

> "Misconduct of government counsel in the form of improper remarks made in the course of the trial, and in the presence of the jury, which is shown to have prevented the defendant from having a fair and impartial trial, is subject to review whether formal objections are made or not; and government counsel should at all times scrupulously refrain from overstepping the bounds of propriety and fairness which should characterize the conduct of a representative of the sovereignty."
>
> *Estep v. United States (10th Circuit) 140 Fed. 2d. 40, 46.*

> "It is especially incumbent upon a prosecuting attorney to observe scrupulously the rules of law in the discharge of his obligation to be fair to the defendant."
>
> *Hilliard v. United States, (4th Circuit) 121 Fed. 2d. 992, 997.*

In view of the weak evidence and the reference to the petitioner's race by the prosecuting witness, petitioner contends that by the improper argument of the District Attorney and the resulting illegal verdict he will be deprived of his liberty without due process of law in violation of the Fifth Amendment and that he was denied the right to a trial by an impartial jury as guaranteed by the Sixth Amendment.

REASONS FOR GRANTING THE WRIT.

The decision below should be reviewed because it erroneously holds that the facts are insufficient to support the verdict. Such a holding is in conflict with the rules laid down in the following cases:

Bergedorff v. United States, (10th Circuit) 37 Fed. 2d. 248;
Brady v. United States, (8th Circuit) 39 Fed. 2d. 312;
Toney v. U. S., (App. D.C.) 67 Fed. 2d. 573.
U. S. v. Mazzafalana, (2 Cir.) 80 Fed. 2d. 826.

A ruling on the sufficiency of the evidence is generally necessary in every criminal case and to lessen the requirements of law as to what constitutes sufficient evidence for a conviction is a matter of concern in all criminal cases and a matter of vital concern to all of the people of the Republic.

The decision below should be reviewed with respect to the improper and prejudicial argument that the defendant was a wealthy man for it is a matter of wide public importance.

The District Attorney is a Federal Officer in close contact with the people of the country and it is therefore peculiarly necessary that his conduct be right, just and proper. *Berger v. U. S.*, 295 U. S. 78, 88.

While the decision of the Court on this question is in conflict with the 9th Circuit case, *Read v U. S., supra.*

it is likewise in conflict with the rule prevailing in all of the state courts. While the rule of the state courts is not a matter that ordinarily concerns this Court, where the rule is unanimous in the State Courts, it adds validity to the decision in the 9th Circuit. Likewise, insofar as the decision holds that it is necessary to a review that objections be made to an improper argument of the District Attorney, it is in conflict with the 10th Circuit decision in *Estep v. United States, supra.* It is of wide importance to the lower courts and to the bar that this question be resolved.

Finally, petitioner concedes that it is a difficult matter for both the trial court and the Appellate Court to determine what effect the reference to "nigger" and what effect the reference to the wealth of the defendant had upon the minds of the jury. In the turbulent condition of our particular part of the country, to picture a defendant as "a big, rich, nigger operator" does appeal to a wide spread public prejudice. Such matter can not be measured by troy weight and ought not to require measuring, as there is no reason why a trial can not take place without such references.

It does not satisfy the constitutional requirements that the petitioner might have been tried by an impartial jury. It is not sufficient for the court to say as it did "There seems little, if any likelihood, that the jury could have been misled by it in returning a verdict based upon passion and prejudice." If there is even a *little* likelihood that the verdict was based upon passion

and prejudice, petitioner has been denied his constitutional rights.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Attorneys for Petitioner.

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CERTIFICATE.

I hereby certify that I have this day served the foregoing petition for certiorari to the Supreme Court of the United States on Frank O. Evans, Esquire, United States Attorney, Macon, Georgia and the Solicitor General, Department of Justice, Washington 25, D.C. by depositing two copies of same in the United States Post Office with first class postage prepaid addressed to the aforesaid counsel at the addresses stated. The copies to the Solicitor General have air mail postage affixed.

This ..... day of December, 1958.

.....

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17316

A. Z. HANDFORD,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(November 21, 1958.)

Before HUTCHESON, Chief Judge, and CAMERON and BROWN, Circuit Judges.

PER CURIAM: This is an appeal from a second judgment of conviction of appellant based upon jury verdict on a charge of possession of nontaxpaid whiskey. We reversed the former conviction because of prejudicial argument made by the United States Attorney, *A. Z. Handford v. United States*, 1958, 249 F.2d 295. The facts are fully set forth in that opinion and will not be repeated here.

As he did before, appellant assigns as error the failure of the court below in this case to grant his motion for ac-

quittal based upon the charge of insufficient evidence. This assignment is mentioned in his brief, and reliance is placed upon it but no argument is made to support it. We think there was sufficient evidence to take the case to the jury.

Appellant's argument takes rather a wide range, but the record reflects only three objections upon which error could be predicated and our discussion will be confined to them.

The Government based its case upon the testimony of Sheriff Johnson who, while detailing what was said when appellant came up to where the whiskey had been found, testified that he had greeted appellant thus: "A. Z., I thought you told me you were going to stay out of the whiskey business." Objection was made and the United States Attorney promptly stated: "I did not intend for that to come into the record, Your Honor;" whereupon the court instructed the jury to disregard it.[1] Normally, what was said under the circumstances here revealed between the officer and the accused would be competent, and appellant relies upon the statements he made to the officer in the same conversation, which were favorable to him. But assuming that the answer might be considered of doubtful admissibility, whatever slight error might have been involved was clearly cured by the judge's instruction to the jury.

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[1] "By the Court: Very well. Members of the jury, pay no attention to the answer which the witness has just given on that question. Just wipe that out of your mind and forget about it. It is ruled out."

The other two errors argued are directed against the argument of the United States Attorney. The former of the two objections related to the government attorney's reference to a surveyor's plat which appellant had offered in evidence. The attorney stated that this was the first time he had ever known of "a nice plat of the premises coming into a courthouse where I have tried a liquor case . . ." Upon appellant's objection the United States Attorney stated: "I apologize to defendant's counsel and to the Court. I probably shouldn't make that observation." And the judge instructed the jury to disregard it.[2]

The second objection was made when the United States Attorney told the jury that they had an opportunity "to clean up a good situation here of a man that operates behind the gun . . .," which idea was repeated several times. Appellant objected, inferring that the United States Attorney was trying to bring the presence of firearms into the record, whereupon the United States Attorney disavowed any such intention, explaining that he was referring to appellant as one who operated through somebody else, not appearing in the open but carrying on the illicit business through others as "his tools out there to operate the liquor business." After an extended colloquy between the court and counsel, the court asked whether appellant's counsel would have any objection to the argument if it was confined to the two people whom appellant had called "his chillun," and who turned out to be his wife and an outsider. To that appellant's

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[2] "By the Court: Yes. Don't go outside of the record, Mr. Evans, and I instruct the jury to pay no attention to that remark."

attorney responded: "Nothing except that he's overrun his time, his fifteen minutes, Judge." Under the circumstances set forth, it appears that the colloquy had turned out to appellant's satisfaction and that the objection was in effect abandoned.

The entire argument of the United States Attorney is reproduced in the record and there is no doubt about the fact that it shows quite a zealous prosecution of the appellant. Most of it was made without objection, however, and that which was made the subject of objection was properly handled, so that there seems little, if any, likelihood that the jury could have been misled by it into returning a verdict based upon passion and prejudice.

Finding no reversible error, the judgment is

AFFIRMED.

JUDGMENT.

Extract from the Minutes of November 21, 1958.

No. 17,316.

A. Z. HANDFORD,

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

* * * * *

FILED
FEB 26 1959
JAMES R. BROWNING, Clerk

No. 578

In the Supreme Court of the United States

OCTOBER TERM, 1958

A. Z. HANDFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 578

A. Z. HANDFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 18–21) is reported at 260 F. 2d 890. The opinion reversing a prior conviction is reported at 249 F. 2d 295.

JURISDICTION

The judgment of the Court of Appeals was rendered on November 21, 1958. The petition for a writ of certiorari was filed on December 15, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support petitioner's conviction.

2. Whether the remarks of the government attorney in his argument to the jury constituted reversible error.

STATEMENT

On May 20, 1958, in the United States District Court for the Middle District of Georgia, petitioner was convicted on a one-count indictment for the possession of distilled spirits without payment of the tax (26 U. S. C. 5008 (b) (1), 5642). He was sentenced to imprisonment for two and a half years. On appeal, the conviction was affirmed. A prior conviction had previously been reversed for improper argument by government counsel. 249 F. 2d 295.

The only witness for the government was L. W. Johnson, Sheriff of Baker County, Georgia, and a former Georgia revenue officer (R. 4, 5). With two state revenue agents, Sheriff Johnson at 9:15 p.m. on July 23, 1956, parked his car beside petitioner's house, facing a tractor which stood between petitioner's house and garage (R. 5). When the car stopped, petitioner came toward it from the back of his house (R. 6). As he approached the car, his wife and Jesse Lee Carlton ran from the garage to the tractor (R. 6). When asked who the people were that ran to the tractor, petitioner said they were his children (R. 6). The officers turned on the car lights and saw that petitioner's wife and Carlton had five one-gallon whiskey jugs at the front of the tractor (R. 6). The officers jumped out of the car, and as they did so, petitioner's wife and Carlton began to break the jugs (R. 6). The officers seized one jug of whiskey, and petitioner's wife and Carlton (R. 6, 7). A five-

gallon jug with wet stopper containing a teaspoonful of whiskey was found in a nearby tool shed, and a funnel, wet with whiskey, was found in front of the tractor (R. 11). No revenue stamps or parts of revenue stamps were found (R. 10, 11). When asked by the officers, petitioner denied possession or ownership of the whiskey and asserted that it belonged to his wife and Carlton who "were out there pouring it up" (R. 10). At the conclusion of this testimony the government rested.

Petitioner did not testify in his own defense but introduced a plot of his premises and the surrounding area. His only witness, a surveyor, testified that the area was open, that there were no fences, and that the premises were open to the street and the public (R. 20–28).

DISCUSSION

1. Petitioner's attack on the sufficiency of the evidence is without merit. The evidence in this case is essentially the same as that which supported the previous verdict of guilty returned against the petitioner. Though the court below, in reversing the previous conviction for improper argument, stated (249 F. 2d 295, 297) "that the evidence was far from conclusive," we believe that there was sufficient evidence in this case to warrant a finding by the jury that the illegal whiskey was within the dominion and control of petitioner, and thus in his possession within the purview of 26 U.S.C. (Supp. V) 5008(b)(1), 5642. The evidence showed that the nontax-paid whiskey was discovered on petitioner's premises in front of his tractor which stood between his house

and garage. When the officers arrived, petitioner was walking toward them from the area in which the tractor was parked. When two figures ran from the garage to the tractor, petitioner falsely told the officers that the two in front of the tractor were his children. He told the officers that the whiskey belonged to his wife and Carlton, and he admitted that he knew they were on his premises "pouring it up" (R. 10). In all the circumstances, the jury had the right to conclude that petitioner was more actively involved than he admitted.

2. Petitioner complains of the argument of government counsel in this case. It should be noted that, except as noted, the remarks complained of now were not the subject of objection below although counsel did complain strongly when the United States Attorney, in referring to petitioner's claim that his wife and Carlton owned the whiskey, spoke of him as the man behind the gun (R. 61–64). Moreover, the record here does not include the argument by petitioner's attorney.[1] Under these circumstances, courts of appeals have held, where it affirmatively appears that the remarks of government counsel were in response to those by defense counsel, that it is impossible to assay the alleged error in the prosecutor's remarks. See *Johnson* v. *United States,* 126 F. 2d 242, 248–249 (C. A. 8); *United States* v. *Dilliard,* 101 F. 2d 829, 837 (C. A.

[1] The United States Attorney who tried the case advises that a record of the defense counsel's summation was not made at the time of the trial. We are further advised that the prosecutor had the opening and closing argument in summation, that the opening argument was waived, the defense summation was made, and government counsel concluded.

2), certiorari denied, 306 U.S. 635; *Murphy* v. *United States,* 39 F. 2d 412, 414 (C. A. 8); *Vause* v. *United States,* 53 F. 2d 346 (C. A. 2), certiorari denied, 284 U. S. 661; *Landay* v. *United States,* 108 F. 2d 698, 706 (C. A. 6), certiorari denied, 309 U.S. 681. We discuss the challenged remarks *seriatim.*

a. In the beginning of his argument, the United States Attorney told the jury that it was his duty to present enough evidence to satisfy the jury beyond a reasonable doubt but he did not believe it his job to present a "repetition of the same thing with different officers * * *" who were available at the courthouse and "who could have been called by the defendant if the defendant had cared to call them" (R. 55). Then, after stating that the jury could assume that the testimony of the sheriff was truthful, he said that if there had been any doubt about the testimony "there would have been no reluctance on the part of these counsel to have put those officers up there to have seen if they could find any discrepancy in the testimony * * *" (R. 55). When the entire record is read it appears that the statement, contrary to petitioner's contention that it chastises him for failing to call those officers as witnesses, merely attempted to show to the jury the truthfulness of the sheriff's testimony. Petitioner himself must have initially thought this too, because he did not object to the statement.

b. After talking about the principle of aiding and abetting, the United States Attorney stated:

> * * * And it's a good thing it's there, because you take a big operator and a smart one, and one that's got money enough—and this, incidentally,

> is the first time that I have ever known of a nice plat of the premises coming into a Courthouse where I have tried a liquor case, either for or against the man in the liquor business.

After objection by petitioner's counsel to the statement as to experience in other cases, the United States Attorney said, "I apologize to Defendant's Counsel and to the Court. I probably shouldn't make that observation." The court then instructed the jury to disregard the remark (R. 60). The apology and the instruction removed any error in this remark. Standing by itself, we do not believe that it calls for reversal.

c. The United States Attorney then continued (R. 60):

> Thank you, sir, I say to you, Members of the Jury, that this case has been defended hard. Every effort has been made to clear this defendant—as ought to be, that's the duty of the lawyers—this defendant can afford to have refinements in the conduct of the search after the truth. If he's in that kind of money position, er, then he's certainly entitled to do it.

This is the comment to which most serious objection is now made. While an objection to the remark was not made at the trial, an extensive argument concerning the propriety and prejudicial effect of the comment was presented to the court below. The Court of Appeals did not specifically pass upon the issue but, in effect, indicated in its opinion (Pet. App. 21) that, in totality, the argument was not so inflammatory as to warrant the conclusion that it prejudiced the jury in its deliberations.

The government, however, after a complete review of the record, feels constrained to confess error. This comment by government counsel does not appear to be responsive to the defense summation. And the remark, insofar as it is a comment on the manner of the defense of the case and the petitioner's "money position," is clearly improper in that it raises matters having nothing to do with the guilt or innocence of the petitioner, and does not conform with the standards imposed upon government counsel by the rulings of this Court. See *Viereck* v. *United States*, 318 U. S. 236, 247–248; *Berger* v. *United States*, 295 U. S. 78, 88; *Read* v. *United States*, 42 F. 2d 636 (C. A. 8). The government also believes that, when the error is considered in the light of the entire proceeding—including the nature of the proof, and the prior remarks by government counsel—we cannot properly contend that the petitioner received a fair trial, or that the error in commenting on the petitioner's financial ability to afford a vigorous and "refined" defense was not likely to influence the jury improperly in its deliberations.[2] This is especially the case where the action had been previously reversed because of improper remarks of government counsel.

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[2] In argument in his petition, petitioner uses the phrase "big, rich, nigger operator" (Pet. 16). By setting this phrase forth in quotes, the petitioner implies that the phrase is a direct quote from the record. This is not true. The United States Attorney at no time used derogatory language regarding petitioner's race. In describing the incident when petitioner was arrested, Sheriff Johnson used the word "negro," but did several times say "nigger."

CONCLUSION

For the foregoing reasons, the United States does not oppose the granting of the petition for a writ of certiorari, and the reversal of the judgments below.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

FEBRUARY 1959.

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HANDFORD *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 578. Decided March 23, 1959.

Certiorari granted; judgment reversed upon consideration of the entire record and the confession of error by the Solicitor General.

Reported below: 260 F. 2d 890.

Julian Webb for petitioner.

Solicitor General Rankin for the United States.

PER CURIAM.

The petition for writ of certiorari is granted. Upon consideration of the entire record and the confession of error by the Solicitor General, the judgment of the United States Court of Appeals for the Fifth Circuit is reversed.